UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES, DERIVATIVE & ERISA LITIGATION	MDL 1446
MARK NEWBY, et al., Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	Civil Action No. H-01-3624 and Consolidated Cases
SILVERCREEK MANAGEMENT INC., et al. Plaintiffs, v. SALOMON SMITH BARNEY, INC., et al., Defendants.	Civil Action No. H-02-3185
SILVERCREEK MANAGEMENT INC., et al. Plaintiffs, v. CITIGROUP, INC., et al., Defendants.	Civil Action No. H-02-0815

CERTAIN DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR AN ORDER CLARIFYING THE COURT'S DECEMBER 10, 2003 MEMORANDUM AND ORDER AND OPPOSITION TO THE SILVERCREEK PLAINTIFFS' CROSS-MOTION FOR CLARIFICATION

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Banc of America Securities LLC ("BAS"), Banc of America Corporation ("BAC"), Salomon Smith Barney Inc. ("Salomon"), and Citigroup Inc. ("Citigroup") (together, the "Moving Defendants") respectfully file this submission in order to make the following points in response to the Silvercreek Plaintiffs' Opposition To Defendants' Motions For Clarification And/Or Reconsideration Of The Court's December 10, 2003 Memorandum And Order And Cross-Motion For Clarification (the "Opposition and Cross-Motion").

1. The Moving Defendants and the Silvercreek Plaintiffs agree on one thing – that the Moving Defendants must have an opportunity, which for procedural reasons they have not yet had, to move to dismiss, under Rule 12(b)(6) or any other applicable provision, the claims that were asserted for the first time in the proposed First Amended Complaint. One of the primary purposes of the Moving Defendants' motion for clarification is to make clear that the two new claims in the First Amended Complaint – a claim under Section 10(b) of the Securities Exchange Act of 1934 against Salomon and Goldman Sachs & Company and a claim under the Texas Securities Act against all four defendants – are not "unchallenged" and that the Moving Defendants must be afforded an opportunity, which they have not yet had, to move against these claims. The Silvercreek Plaintiffs agree that the claims are not unchallenged and that the Moving Defendants "will be able to respond to these claims" (Opposition and Cross-Motion at ¶ 13), and consequently the Silvercreek Plaintiffs effectively agree to much of the relief sought by the Moving Defendants in their motion for clarification.

2. The Moving Defendants and the Silvercreek Plaintiffs are also in agreement on the schedule for moving to dismiss these claims. The Moving Defendants proposed that their motions to dismiss the new claims asserted for the first time in the First Amended Complaint be filed in accordance with the schedule set forth in the Court's July 11,

2003 Scheduling Order (although they noted their willingness to proceed on the schedule in the April 17, 2003 Stipulation and Order if that is what the Court prefers). The Silvercreek Plaintiffs do not object to proceeding on the schedule in the July 11, 2003 Scheduling Order. (Opposition and Cross-Motion at ¶ 16). Therefore, this aspect of the Moving Defendants' motion for clarification is also not disputed.

3. The parties disagree, however, over whether the First Amended Complaint is already the operative complaint in this case. The Silvercreek Plaintiffs' contention that the First Amended Complaint should be deemed operative and their motion for leave to amend be deemed granted *nunc pro tunc* is misguided. In support of their contention, the Silvercreek Plaintiffs assert that the "only condition" in the April 17, 2003 Stipulation and Order

> "which would effect [sic] whether the First Amended Complaint should be deemed filed was subparagraph (i), which provided that 'if any other defendant opposes the Motion [for leave to amend] and the Court denied the Motion, then such denial shall be deemed to apply to Defendants Salomon and Banc of America, the First Amended Complaint shall be deemed withdrawn, and the original Complaint shall be the operative complaint in this matter.'"

(Opposition and Cross-Motion at ¶ 11). Similarly, the Silvercreek Plaintiffs assert that the Moving Defendants "stipulated that the First Amended Complaint would be filed unless a party opposed the motion." (Opposition and Cross-Motion at ¶ 12). These assertions are incorrect. The April 17, 2003 Stipulation and Order explicitly provides that there are not one but three conditions on the Moving Defendants' consent to the proposed amendment, and it does not contain any stipulation that the First Amended Complaint would automatically be deemed filed in the absence of an opposition from another party. The second condition in the April 17, 2003 Stipulation and Order, which the Silvercreek Plaintiffs ignore in their Opposition and Cross-Motion, is contained in subparagraph (ii) and relates to the parties' agreement, "irrespective of whether the Motion [for leave to amend] is denied," to seek consolidation and a uniform

schedule for Silvercreek I and Silvercreek II, and the plaintiffs' agreement that their claims in Silvercreek II do not relate back to the original complaint. The third condition, in subparagraph (iii), is that the defendants in Silvercreek I are to have 45 days from the later of (a) the lifting of the stay in Newby or (b) the date the Court issues a decision on the motion for leave to amend in Silvercreek I to answer, move to dismiss, or otherwise respond to the operative complaint in both cases. With these provisions, the parties explicitly recognized that the Court had not yet decided whether to grant or deny the motion for leave to amend and acknowledged the possibility that the Court might, at some point after "so ordering" the stipulation, decide either to grant, or to deny, the motion for leave to amend. Other parts of the April 17, 2003 Stipulation and Order also envisioned the possibility that the Court might deny, rather than grant, the motion for leave to amend. See April 17, 2003 Stipulation and Order at 2 ("if the Court denies the Motion [for leave to amend], Defendants may elect to rely on their motions to dismiss currently pending in this matter"). Thus, the April 17, 2003 Stipulation and Order did not provide for the automatic granting of the motion for leave to amend, but rather anticipated that the motion was to be ruled upon by the Court at some time in the future. To date, the Court has not ruled on that motion.

4. With regard to the Morwick Declaration, which the Court previously struck, the Silvercreek Plaintiffs argue that "the Court can reach the same conclusion that it did in its December 10, 2003 Memorandum and Order without considering" the declaration. (Opposition and Cross-Motion at ¶ 14). But the Court did not reach that conclusion without considering the declaration; rather the Court reached its conclusion specifically based on its consideration of the declaration. For this reason, the Court should reconsider the December 10, 2003 Memorandum and Order, at least to determine whether, without considering the stricken declaration, it can reach the same conclusion, or must reach a different conclusion.

5. Finally, the Silvercreek Plaintiffs' suggestion that the Court amend the December 10, 2003 Memorandum and Order to state that the claims that the Court dismissed were dismissed "without prejudice" (Opposition and Cross-Motion at ¶ 15) should be rejected for two reasons. First, the Court's July 11, 2003 Scheduling Order (emphasis in original) specifically provides that "**IN ALL AMENDED PLEADINGS, COUNSEL SHALL NOT REITERATE ALLEGATIONS OR ARGUMENTS PREVIOUSLY REJECTED BY THIS COURT IN RULINGS ON MOTIONS TO DISMISS THE CONSOLIDATED COMPLAINTS.**" Apart from the request for reconsideration as indicated in the preceding paragraph, the Moving Defendants are only seeking the opportunity to move against the claims that they have not previously had the opportunity to move against, not to move a second time against the allegations that the court has already addressed and sustained. As the Court recognized in the July 11, 2003 Scheduling Order, the same should apply to plaintiffs: claims that are out should stay out. Moreover, the provision in the July 11, 2003 Scheduling Order directing plaintiffs in consolidated cases to decide, after the entry of a class certification order, whether to proceed under the consolidated complaint in Newby or to proceed under their own complaint, "or request leave to amend," was not designed to afford plaintiffs whose claims have already been dismissed to seek leave to re-assert those claims. Second, the claims that the Court dismissed in the December 10, 2003 Memorandum and Order were dismissed for reasons that cannot be overcome. For example, the common law fraud claim against BAS will continue to suffer from the fatal defect that this Court has now twice recognized, in dismissing the fraud claim against Bank of America Corp. in Newby and in dismissing the fraud claim against BAS in this case. The negligent misrepresentation claim will continue to be barred as a matter of law by the Martin Act no matter how many times the plaintiffs are allowed re-plead it.

Dated: January 15, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I herby certify that a true and correct copy of the foregoing instrument was served upon all known counsel or record by website, http://www.esl3624.com, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this 15th day of January, 2004.

Charles G. King